No. 84-1077

In the Supreme Court of the United States

OCTOBER TERM, 1984

HAROL WHITLEY, et. al.,

Petitioners,

v.

GERALD ALBERS

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DEC. 31, 1984
CERTIORARI GRANTED JUNE 10, 1985

INDEX

Page

Chronological List of Relevant Docket Entries 1

Respondent's Amended Complaint—Demand for Jury Trial 2

Petitioners' Answer 9

Respondent's Stipulated Facts 13

Transcript of Trial Proceedings 19

The following opinions have been omitted in printing this appendix, because they appear on the following pages of the printed petition for certiorari:

Ninth Circuit Court of Appeals Opinion, dated Oct. 1, 1984 ..... App-1

District Court for the District of Oregon Opinion, dated Aug. 31, 1982 ..... App-15

CHRONOGICAL LIST OF RELEVANT DOCKET ENTRIES

June 8, 1981—Plaintiff's Complaint for Damages and Demand for Jury Trial filed in the United States District Court for the District of Oregon.

Aug. 19, 1981—Defendants' Answer filed in the United States District Court for the District of Oregon.

May 21, 1982—Plaintiff's Amended Complaint for Damages and Demand for Jury Trial filed in the United States District Court for the District of Oregon.

[Plaintiff's Amended Complaint raised no new issues and an Amended Answer was deemed unnecessary.]

June 1-3, 1982—Trial was held in the United States District Court for the District of Oregon.

June 3, 1982—Defendants' Motion for Directed Verdict as to all defendants granted.

June 4, 1982—Stipulated Facts filed in the United States District Court for the District of Oregon.

August 31, 1982—Judgment of the United States District Court for the District of Oregon.

Sept. 29, 1982—Plaintiff filed Notice of Appeal in the United States Court of Appeals for the Ninth Circuit.

Oct. 1, 1984—Opinion of the United States Court of Appeals for the Ninth Circuit.

Dec. 31, 1984—Defendants' Petition for Writ of Certiorari filed.

June 10, 1985—Certiorari granted.

RESPONDENT'S AMENDED COMPLAINT DAMAGES—DEMAND FOR JURY TRIAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[filed May 21, 1982]

GERALD ALBERS, Plaintiff, v. HAROL WHITLEY, individually and in his official capacity as Assistant Superintendent at the Oregon State Penitentiary; HOYT C. CUPP, individually and in his official capacity as Superintendent at the Oregon State Penitentiary; J.C. KEENEY, individually and in his official capacity as Assistant Superintendent at the Oregon State Penitentiary; and ROBERT KENNECOTT, individually and in his official capacity as a correctional officer at the Oregon State Penitentiary, Defendants.	)	Civil No. FIRST AMENDED COMPLAINT - DAMAGES DEMAND FOR JURY TRIAL

JURISDICTION AND VENUE

1. This is a civil action seeking damages against defendants authorized by 42 U.S.C. § 1983, and the Eighth and Fourteenth Amendments to the United States Constitution. Jurisdiction is founded on 28 U.S.C. § 1343. Plaintiff further invokes the pendent jurisdiction of this court to consider claims arising under Oregon state law.

2. Venue in this district is proper under 28 U.S.C. § 1391(b).

PARTIES

3. Plaintiff Gerald Albers is, and was at all times described in this complaint, a citizen of the United States and an inmate at the Oregon State Penitentiary in Salem, Oregon.

4. Defendant Harol Whitley is and was at all times described in this complaint an assistant superintendent of the Oregon State Penitentiary and, in such capacity, led an attack by correctional officers on inmates in Cell Block A of the Oregon State Penitentiary during a disturbance on or about June 27, 1980. He is being sued individually and in his official capacity. He maintains offices at 2605 State Street, Salem, Oregon.

5. Defendant Hoyt C. Cupp is and was at all times described in this complaint superintendent of the Oregon State Penitentiary and, in such capacity, authorized a raid by correctional officers on Cell Block A of the Oregon State Penitentiary during a disturbance on or about June 27, 1980. He is being sued individually and in his official capacity. He maintains offices at 2605 State Street, Salem, Oregon.

6. Defendant J.C. Keeney is and was at all times described in this complaint an assistant superintendent of the Oregon State Penitentiary and, in such capacity, authorized a raid by correctional officers on Cell Block A of the Oregon State Penitentiary during a disburbance on or about June 27,

1980. He is being sued individually and in his official capacity. He maintains offices at 2605 State Street, Salem, Oregon.

7. Defendant Robert Kennecott is and at all times described in this complaint was a correctional officer at the Oregon State Penitentiary and, in such capacity, participated in a raid on Cell Block A of the Oregon State Penitentiary during a disturbance on or about June 27, 1980. He is being sued individually and in his official capacity. He maintains offices at 2605 State Street, Salem, Oregon.

8. In doing all the acts herein alleged, all of the defendants, and each of them, were and are acting under color of state law, custom and usage, and by virtue of the authority vested in each of them by the Constitution and the laws of the State of Oregon and the capacities as heretofore and hereinafter alleged.

9. At all times relevant herein, defendants, and each of them, knew, or should have known, of the acts, omissions and conditions alleged herein, and that said acts, omissions and conditions violated plaintiff's Constitutional and statutory rights.

FIRST CLAIM FOR RELIEF

10. Plaintiff was housed in Cell 274 of Cell Block A at the Oregon State Penitentiary on June 27, 1980, when a disturbance began at approximately 9:15 p.m. The inmates in Cell Block A, numbering in excess of 200, had not yet been confined to their cell for the evening.

11. Upon information and belief, on June 27, 1980, at approximately 9:15 p.m., several inmates in Cell Block A became distressed when it appeared that other inmates who were being taken to the prison's segregation and isolation building were being mistreated by corrections officers as they passed in front of Cell Block A. Several of the Cell Block A inmates then became unruly and one of them, Richard Klenk, produced a knife and seized Oregon State Penitentiary Corrections Officer Stan Fitts, who was then assigned to Cell Block A, as a hostage.

12. Cell Block A consists of two tiers, with 56 cells on the upper tier and 55 cells on the lower tier. The lower tier is adjacent to an open area in which there is a stairway leading to the upper tier. A door which provides access from the lower tier to the open area was locked immediately after the disturbance began, confining the inmates in the lower tier. Inmates on the upper tier were still able to ascend and descend the stairs from the upper tier to the open area.

13. Corrections Officer Fitts was taken by Klenk to cell 201, on the upper tier on Cell Block A.

14. Defendant Whitley entered Cell Block A and immediately learned that inmate Klenk was commanding the disturbance. Defendant Whitley talked to Klenk and Officer Fitts, learning that Officer Fitts was unharmed.

15. In the meantime, plaintiff had been requested by other inmates on the upper tier to leave his cell and go down to the area outside the lower tier to help calm down the disturbance. Plaintiff proceeded to the area outside the lower tier,

where he attempted to calm down inmate Klenk and spoke with defendant Whitley. At the suggestion of another inmate, plaintiff asked defendant Whitley whether he could open the locked door to the lower tier cells to let a few elderly inmates leave the cell block while the disturbance was being resolved. Defendant Whitley said he would get the key to the locked door and exited the cell block.

16. Upon information and belief, defendant Whitley then consulted with defendants Cupp and Keeney about the disturbances. The three officials determined that corrections officers should raid the cell block with rifles.

17. Plaintiff waited in the stair-well area on the lower tier to provide whatever help he could in resolving the disturbance. Defendant Whitley then returned to the cell block and plaintiff reminded him about the elderly inmates in the lower tier cells. Defendant Whitley said that he was not able to get the key to the locked door and immediately turned toward the main cell block entrance and yelled "let's go." Numerous corrections officers ran into the cell block, responding to defendant Whitley's scream to "shoot these bastards."

18. Plaintiff started up the stair-well to his cell when defendant Kennecott discharged his shotgun into the back of plaintiff's left leg.

19. Prior to the shooting, defendants Whitley and Kennecott knew or should have known that plaintiff neither promoted nor participated in the disburbance and was in the stair-well area on the lower tier outside the lower tier cells in order to help achieve a quick and safe resulution [*sic*] of the disburbance.

20. Prior to the shooting, defendants Whitley and Kennecott knew or should have known that plaintiff was unarmed and presented no danger to them, or anyone else.

21. Upon information and belief, defendants Cupp and Keeney authorized defendant Whitley to lead an armed raid on Cell Block A without regard to the physical safety and welfare of persons in the cell block, nor with concern for protecting those persons who were not involved in the disturbance.

22. After being shot, plaintiff was bound at his wrists and dragged upon his back, side and stomach, to an area outside of Cell Block A, where he was left unattended, without medical assistance, for approximately one hour.

23. As a direct and proximate result of defendants' intentional and reckless acts described above, which were deliberately indifferent to plaintiff's physical well-being, plaintiff has sustained severe nerve damage to his left lower leg, with residual paralysis, to plaintiff's general damage in the amount of $150,000 [*sic*] $250,000 and to plaintiff's special damage in the amount of $18,576.65.

24. The acts of defendant were willful, malicious and contrary to their societal obligations, and plaintiff is entitled to recover an additional $100,000 in punitive damages against defendants.

25. The acts and omissions of defendants, and each of them, deprived plaintiff of his rights to be free from cruel and unusual punishment and to due process under the Eighth and Fourteenth Amendments to the United States Constitution, respectively.

SECOND CLAIM FOR RELIEF

Plaintiff realleges paragraphs 1 through 23 of the complaint filed therein.

The acts and conduct of the defendants constitute assault and battery, and negligence under the laws of the State of Oregon, and this court has pendent jurisdiction to hear and adjudicate said claims. Plaintiff served written notion of his claims against defendants on November 14, 1980, in accordance with ORS 30.275(1).

WHEREFORE, plaintiff hereby demands:

1. A jury trial in this proceeding;

2. General damages in the amount of $250,000 and Special Damages in amount of $18576.65 based upon both plaintiff's First and Second Claims for Relief;

3. Punitive damages in the amount of $100,000, based upon plaintiff's First Claim for Relief;

4. Judgment against defendants on account of his costs, disbursements and reasonable attorney fees incurred herein.

6) Such further relief as the court may deem just and proper.

[Signature omitted in printing]

PETITIONERS' ANSWER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[filed August 19, 1981]

[Title of case omitted in printing]

Comes now defendants Harol Whitley, Hoyt C. Cupp, J.C. Keeney and Robert Kennecott, by and through their attorney, Scott McAlister, Assistant Attorney General, and for answer to plaintiff's complaint on file herein, admit, deny and allege as follows:

I

(1) Admit paragraph 1.

(2) Admit paragraph 2.

PARTIES

(3) Admit paragraph 3.

(4) Admit defendant Whitley supervised a force of correctional officers who entered cellblock A with the express purpose of regaining control of said cellblock and freeing a hostage held therein. Allege defendant Whitley at that time was the Security Manager of the Oregon State Penitentiary.

(5) Admit defendant Cupp's described supervisory position and that he authorized a force of correctional officers to enter cellblock A with the express purpose of regaining control of said cellblock and freeing a hostage held therein.

(6) Admit defendant Keeney's described supervisory position and that he supported and acquiesced in the decision to authorize a force of correctional officers to enter cellblock A

with the express purpose of regaining control of said cellblock and freeing a hostage held therein.

(7) Admit defendant Kennecott's described position and that he participated as a member of force of correctional officers who entered cellblock A with the express purpose of regaining control of said cellblock and freeing a hostage held therein.

(8) Admit paragraph 8.

(9) Deny paragraph 9.

FIRST CLAIM FOR RELIEF

(10) Admit paragraph 10.

(11) Admit paragraph 11.

(12) Admit paragraph 12.

(13) Admit paragraph 13.

(14) Admit defendant Whitley entered cellblock A and was told by inmate Klenk that he (Klenk) was in control. Allege defendant Whitley then requested that Klenk calm the disturbance and that when Klenk yelled out to calm down, the disturbance in fact increased. Admit defendant Whitley determined Officer Fitts was as yet unhurt. Allege Officer Fitt's [*sic*] life was threatened at that time.

(15) Defendants are without knowledge or information as to what other inmates requested of plaintiff. Deny plaintiff tried to calm inmate Klenk down while defendant Whitley was present nor did plaintiff speak with defendant Whitley at any time prior to the discharge of firearms.

(16) Admit defendants consulted and determined the necessity to use firearms which are alleged to be shotguns armed with birdshot.

(17) Deny paragraph 17 except as to defendant Whitley yelling "let's go" or words to that effect. Allege plaintiff was seen standing nearby by [*sic*] defendant Whitley and that plaintiff did nothing to calm the disturbance nor did he speak to defendant Whitley. Allege that a plan of action had already been arrived at which precluded any unnecessary shooting and/or injury.

(18) Admit plaintiff was shot by an officer entering cellblock A. Allege a warning shot was fired first by defendant Kennicott [*sic*]. Defendants are without knowledge as to who actually shot plaintiff.

(19) Deny paragraph 19.

(20) Deny paragraph 20.

(21) Admit defendants Cupp and Keeney authorized armed officers to enter cellblock A. Deny that they did so without regard for the safety of those therein. Allege defendants actually discussed and directed that shooting and injuries were to be held to an absolute minimum.

(22) Deny paragraph 22. Allege plaintiff was treated by a hospital technician within a few minutes of being struck, was transported to the penitentiary hospital without any restraints and was only placed in restraints upon being transported to Salem Memorial Hospital.

(23) Deny paragraph 23.

(24) Deny paragraph 24.

(25) Deny paragraph 25.

SECOND CLAIM FOR RELIEF

Defendants incorporate their answers to plaintiff's 1-23 as to plaintiff's second claim for relief.

FOR A FIRST AFFIRMATIVE ANSWER AND DEFENSE:

Defendants allege that at all times herein mentioned in plaintiff's complaint, they were acting in good faith and within their discretion pursuant to the laws and statutes of the State of Oregon and the United States, and had good cause to believe, and do believe, their conduct was proper.

FOR A SECOND AFFIRMATIVE ANSWER AND DEFENSE:

Defendants allege and contend that if liability is determined, they are immune from liability for punitive damages and assessment of costs and disbursements as a matter of law.

FOR A THIRD AFFIRMATIVE ANSWER AND DEFENSE:

Allege that defendants are immune from liability as a matter of law.

WHEREFORE, defendants pray for judgment herein denying plaintiff relief and granting defendants their costs, disbursements and attorney fees incurred in the defense hereof.

[Signature and certification omitted in printing]

RESPONDENT'S STIPULATED FACTS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Read to the jury by agreement of the parties, see Tr. 53-60, and filed June 4, 1982]

[Title of case omitted in printing]

1. Plaintiff Gerald Albers was an inmate at the Oregon State Penitentiary in Salem, Oregon, on June 27, 1980. Plaintiff Albers was then housed in Cell Block A of the penitentiary.

2. Defendant Harol Whitley is now, and was on June 27, 1980, the Security Manager of the Oregon State Penitentiary. Acting in his official capacity, defendant Whitley supervised a force of correctional officers who entered Cell Block A on June 27, 1980, following a disturbance in the cell block.

3. Defendant Hoyt C. Cupp is now, and was on June 27, 1980, Superintendent of the Oregon State Penitentiary. Acting in his official capacity, defendant Cupp authorized a force of correctional officers to enter Cell Block A on June 27, 1980, following a disturbance in that cell block.

4. Defendant J. C. Keeney is now, and was on June 27, 1980, an Assistant Superintendent of the Oregon State Penitentiary. Acting in his official capacity, defendant Keeney authorized a force of correctional officers to enter Cell Block A on June 27, 1980, following a disturbance in that cell block.

5. Defendant Robert Kennecott is now, and was on June 27, 1980, a correctional officer at the Oregon State Penitenti-

ary. Acting in his official capacity, defendant Kennecott participated as a member of a force of correctional officers who entered Cell Block A on June 27, 1980, following a disturbance in that cell block. At the time of entering the cell block, defendant Kennecott carried a shotgun.

6. In doing all the acts described in this litigation, all of the defendants were acting under color of state law, custom and usage, and by virtue of the authority vested in each of them by the Constitution and the laws of the State of Oregon.

7. Cell Block A consists of two tiers, with 56 cells on the upper tier and 55 cells on the lower tier. The cell block houses over 200 inmates. The lower tier cells are adjacent to an open area from which there is both a stairway leading to the upper tier and a hallway leading out of the cell block. The lower tier cells are separated from the open area by floor-to-ceiling bars. A barred door allows for access from the lower tier cells to the open area.

8. Cell Block A is an "honor" cell block, wherein inmates who have good disciplinary records are housed. Cell Block A inmates have privileges, including more time outside of their cells which are denied the remainder of the prison population. Normally, Cell Block A inmates are not required to remain in their cells, or, in other words, "cell-in," until 11:00 p.m. on weekdays and 12:00 a.m. on weekends.

9. On Friday night, June 27, 1980, some inmates in Cell Block A became distressed when it appeared that other inmates who were being taken to the prison's segregation and isolation building were being mistreated by corrections

officers as they passed in front of Cell Block A. Two corrections officers, Walker S. Fitts and John Kemper, were on duty in Cell Block A at the time. Although it was only approximately 9:15 p.m., nearly three hours before inmates would normally be required to cell-in, Officer Kemper received a telephone call in which he was told to order all inmates in Cell Block A to return to their cells. Officer Kemper, in turn, gave an order to Cell Block A for inmates to cell-in. At the time that he gave the order, Officer Kemper was standing in the open area adjacent to the lower tier cells and plaintiff was at his upper tier cell #274.

10. Several inmates questioned Officer Kemper as to why he gave the order to cell-in. One inmate, Richard Klenk, became particularly upset. Officer Kemper left the cell block but Officer Fitts, who was standing nearby, remained.

11. The steel barred door which provides access from the lower tier cells to the open area in front of the cell block was locked at some point after Officer Kemper left A Block.

12. Shortly after Officer Kemper left the cell block, some inmates began to break furniture. Two inmates then told Officer Fitts to go into an office off of the open area, saying that he would be protected there. After Officer Fitts entered the office, the door to it was closed.

13. Defendant Whitley then entered Cell Block A, climbing over some furniture which had been placed by inmates in the hallway leading into the cell block. Defendant Whitley talked with inmate Klenk. Four inmates were then allowed to go to the segregation and isolation building to see the condi-

tion of the inmates who had been taken there earlier. Defendant Whitley left the cell block with the four inmates, who then visited the segregation and isolation building and returned to Cell Block A.

14. Defendant Whitley returned to Cell Block A several minutes later and asked inmate Klenk to allow him to see Officer Fitts. Inmate Klenk walked over to the office where Officer Fitts was located and returned with him to see defendant Whitley.

15. Defendant Whitley determined that Officer Fitts was unharmed. Defendant Whitley left the cell block and Officer Fitts returned to the office. At some point, inmate Klenk had received a home-made knife.

16. Officer Fitts remained in the office for another 15 minutes, when he was escorted to cell #201 on the upper tier. Inmates placed him in cell #201 and then stood in front of the cell.

17. The two inmates who were housed in cell #201, Kurt Riemer and Michael Kliment, remained in Officer Fitts' vicinity.

18. Defendant Whitley entered Cell Block A for a third time. He asked inmate Klenk to show him where Officer Fitts was located. Inmate Klenk took defendant Whitley up to cell #201. Defendant Whitley approached Officer Fitts, asked him if he was alright, [*sic*] and Officer Fitts responded that he remained unharmed. At the time defendant Whitley spoke with Officer Fitts, two inmates of Cell Block A were inside cell 201 and advis d [*sic*] defendant Whitley that they would

prevent any harm to Officer Fitts. Defendant Whitley then left cell 201 and went downstairs.

19. At about 10:30 p.m., defendant Whitley again entered Cell Block A, leading a group of corrections officers, three of whom were armed with shotguns. Defendant Kennecott, carrying a shotgun, followed defendant Whitley. Corrections officers Clinton Smith and David Jackson, also armed with shotguns, entered the cell block after defendant Kennecott.

20. While entering the cell block, defendant Kennecott discharged a first shot into the wall opposite the cell block entrance.

21. After discharging the first shot, defendant Kennecott discharged second and third shots towards the direction of plaintiff. One of these latter two shots hit plaintiff in his knee.

22. In the meantime, defendant Whitley had run up the stairs towards cell #201, chasing inmate Klenk, who had also begun to run up the stairs. Defendant Whitley ran past plaintiff, who had been standing at the bottom of the stairs.

23. From the time a cell-in order was issued, at about 9:15 p.m., until he was shot, at about 10:30 p.m., plaintiff received no orders or instructions from defendants or other corrections officers relating to his movement or location within the cell block, nor an opportunity to seek safety.

24. Defendant Whitley subdued inmate Klenk in front of cell #201. The inmates housed in cell #201 had prevented inmate Klenk from entering that cell. With inmate Klenk

under control, Officer Fitts left cell #201 and exited from the cell block.

25. Defendant Whitley was authorized by defendants Cupp and Kenney [*sic*] to enter Cell Block A with firearms.

26. The rules and procedures under which defendants perform their duties require that the use of physical force by staff members will occur only when the exercise of persuasion, advice and warnings are found to be insufficient to obtain cooperation. Additionally, physical force will be used only with due regard for the safety of staff and the safety of others. Only the minimum degree of physical force which is necessary on any particular occasion will be used.

27. The rules and procedures under which defendants perform their duties require that staff members shall exhaust every reasonable means of control before resorting to the use of firearms.

28. Plaintiff is known by defendants to be a well-behaved inmate.

[Paragraphs 29 and 30 were deleted from the stipulation by agreement of trial counsel]

31. A call for an ambulance was made at 9:43 p.m. An ambulance was dispatched at 10:27 p.m., and left the penitentiary at 11:00 p.m.

[Signatures omitted in printing]

TRANSCRIPT OF TRIAL

(excerpt)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Title of case omitted in printing]

[June 3, 1982]

[583]

* * * * *

MR. MCALISTER: May it please the Court. Again, directing the Court's attention to our motion for summary judgment, we would reraise all issued [*sic*] therein stated, only we would not raise them with respect to a motion for directed verdict at the conclusion of the

[584]

case.

If the Court wishes, I can address each separate issue we are raising.

THE COURT: Yes, I would like for you to.

MR. MCALISTER: I will not re-read, unless the Court specifically asks, the memorandum which we have previously submitted.

THE COURT: It's not necessary to read the whole memo, but I do want you to point out the particular cases that you rely upon and make your legal argument.

MR. MCALISTER: We would first ask the Court to treat each defendant separately in this matter. And we would point out, as we have previously, that we believe that the Constitutional issues are completely separate from the state issues. I

would begin by suggesting to the Court that the state issues be dismissed on the ground that as a matter of law, the state officials are immune from liability under state law. We are not now addressing the issue of the Constitutional limitation. I certainly would agree that the state law cannot make state officials immune from a 1983 action, but we would contend that separately under the state statutory provisions relating to the control of riots, these defendants are immune from liability in the state courts, and therefore the

[585]

pendent jurisdiction must be dismissed with respect to that.

Addressing now the initial issue, which is whether or not plaintiffs have proved an Eight [*sic*] Amendment violation. Defendants would contend that the pivotal case, the one which defines the law as far as the Eighth Amendment is concerned, is the case of *Estelle vs. Gamble*. We would submit to this Court that there is absolutely no showing that, one, the force used was used for punishment; two, there was at no time any evidence of administrative indifference, and there was no evidence of wanton inflicting of unnecessary pain.

That being the case, there is no showing of an Eighth Amendment violation, and as to that, the case should be removed from the jurisdiction considered and directed judgment on that issue be entered for the defendants.

The Fourteenth Amendment allegation is substantially more complex. We have set a large number of cases forth on that issue, and I would submit to the Court at the outset that it's clear that the case law is very confusing to what standard

is to be applied. However, we would contend that there is no evidence that the intent of any of the defendants was to

[586]

violate a civil right of the plaintiff in this case, and it is in essence an accidental shooting. No one claims that the plaintiff was doing anything wrong. He was simply in the wrong place when the prison officials took the actions necessary to control the disturbance.

Now, I'll probably bore the Court a little bit, but I would like to go back to what 1983 actions were about in the first place. As the Court will recall, the 42 U.S. Code Section 1983, is an extremely old statute. It dates back to 1871, and I think it's extremely significant that one of the common names for that particular statute was the Ku Klux Klan Act of 1871, because I think that defines what Congress at that time was attempting to legislate about.

And basically, as the Court recalls, during that particular period of time — which was basically a period in which the Southern states had been defeated following a war and basically tossed out of the Governmental system, and the President of the Northern states had freed the slaves in the Southern states for all practical intents and purposes — there was a concern in Congress that as the Southern states were readmitted to the Union and allowed to govern themselves once again, the government in the Southern

[587]

states would not afford the newly freed citizens their Constitutional rights, and that by governmental action the newly freed slaves would be prevented from

exercising these rights through fear, intimidation, outright assault, et cetera.

It certainly was never contemplated, I'm sure, at that particular period of time that subsequent inmates would be bringing suits against the custodians over the manner in which they were treated. I have no quarrel, however, with the application of the statute to that circumstance. I think it's just necessary to look at it in that context. But it was clearly designed to prevent people who are trying to keep other people or injure other people's Constitutional rights from doing that. It was a civil remedy intended much like the Exclusionary Rule to prevent intentional wrongdoing.

This is not an intentional wrongdoing case. There was no intent — there's been no evidence of intent in this case to deprive anyone of anything. The officials took the action necessary, not even against plaintiff, but against a general situation in which plaintiff, if not involved, was at least improperly present.

Therefore, I do not believe you can make a Fourteenth Amendment claim under those facts. Now,

[588]

I'm aware that counsel argues that there is no intent requirement, and I think if you were talking about intent in terms of the criminal law, he might be correct. However, as far as civil intent is concerned, I think in a 1983 action, you have to have some intent to intimidate or violate a Constitutional right.

THE COURT: What do you say about the Parrett [*sic*] case?

MR. MCALISTER: Your Honor, I don't think anybody can say anything about the Parrett [*sic*] case, particularly since I think it was in either a dissenting or contrary opinion, the one justice wrote, "We once again put our shoulder to the wheel. If they did, they firmly missed the wheel once again. That particular case went off on very strange facts, and the central issue which I think both plaintiffs and defendants in many civil rights cases have been trying to present to the Supreme Court for a number of years now was once again missed, and that is the intent element.

In that particular case we view it as a case in which the allegation was that due process was not afforded, and the Supreme Court ducked the issue by saying, "Well, there is due process; you just didn't go get it." Now, that is the narrow holding, but I think the broader language must be implied to mean

[589]

that it's not just enough that a Constitutional right was violated. You have to have some intent. You have to look at what the statute is trying to protect. In essence, what the plaintiffs have done in this case is, they simply bootstrapped a pure state negligence claim. You cannot point to one factor in that suit that could not have been presented to a state jury on state law.

As to liability for injuries: factually, now, there is the legal defense, but that is another matter. The fact that the state doesn't create a remedy doesn't mean it's a violation of the Constitutional right. There has been no challenge to the validity of that state statute, but as far as this is concerned, it's

a simple negligence action. It's no different than if an inmate fell down a flight of stairs, argued that the distance between the stairs was too great, and therefore they're injured because they were in the custody of the institution, because the institution was the one who put in the stair steps; they were injured as a result; their Constitutional rights have been violated.

I cannot imagine that in 1871, Congress contemplated creating a Federal negligence action. The only thing that differs in this case from a pure negligence

[590]

shooting case is the fact that the shooters happened to be prison officials, and the inmate happened — or the plaintiff happened to be a prisoner. If the identical thing had happened, if a citizen was running down my house, passed my house, I try and interrupt a riot, I shoot him, we are in state court; there is no difference, and therefore, you cannot read Section — 42 U.S. Code Section 1983 simply to create a negligence action at the Federal level.

But that in essence is what the argument has to be. And therefore, we are contending that that is basically what all that has been proved in the case, and therefore we are entitled to have a dismissal of the Federal Constitutional claims.

Even if we weren't — do you want me to stop there?

THE COURT: Yes, that's fine, thank you.

Let me see Judge Friendly's decision.

All right, Mr. Mechanic, what do you say?

MR. MECHANIC: Well, Your Honor, I believe that we addressed the immunity question in the brief, and there is not much to add there. Other than that immunity section, according to legislative history, and the language doesn't apply —

THE COURT: Why do you contend it doesn't apply?

[591]

MR. MECHANIC: Well, we attached the legislative history to our supplemental memo, or plaintiff's memo in opposition to defendant's motion for summary judgment, and that legislative history indicates that that was designed to protect public bodies and not individual personal liability, and I believe that other than that particular argument, there really isn't much more that I could say.

It doesn't apply to the particular circumstances of this case. We would not be able to, as I understand it, sue the State of Oregon, but according to Section 86 of the comments on the house bill which created that law — which are attached again to the memo — this section is added to preserve immunity from claims arising out of civil disturbances. Preservation of immunity in this instance is common in other states if it doesn't bar claim for torts committed by public employees during the course of civil disturbances, but would preclude claims based on a theory that a public body caused or failed to prevent a civil disturbance.

Liability insurance policies commonly exclude coverage of this risk, and that is simply not the purpose of the statute, but foreclose the opportunity of inmates who might be damaged under state law in

[592]

the context of a disturbance to attempt to recover.

Now, as far as looking at 1983, I haven't been practicing for all that long, but when I started out working for the Attorney General's Office in another state, that is the same argument I used to give. It just doesn't hold water, going back to the Ku Klux Klan Act; it just doesn't hold water. There have been cases that have been decided through the years that have pretty well clarified the parameters of 1983. We are still trying — I agree with Mr. McAlister and understand some of the reasoning for it. But certain things are clear.

One thing is that it does clearly provide a remedy for persons who are under the custody of the state and subject to state action, and there are policy reasons for that. But I needn't go into that, as opposed to getting shot on the street. There may be policy reasons why that person should be in the state court, but if you are shot in a prison, regardless of the policy reasons, there is state action involved and your civil rights are violated, of course there is 1983 jurisdiction.

Now, as far as our attempt to bootstrap this into a negligence claim, I don't disagree with the fact that there are tremendous overlappings there between the state theories and the Federal theories. I think

[593]

that we have a remedy in Federal court. We have a right to proceed in Federal court. We could have gone into state court, but that was not the choice. And clearly, we are not obligated to under 1983 to go first into state court, and if we have state claims that we can append, then we have a clear right to do so.

As far as the Eighth and Fourteenth Amendments are concerned, we have taken the position in our brief, and we reiterate that the courts really haven't defined exactly what the Eighth Amendment is and what the Fourteenth Amendment is as far as the use of force. They have established principles using those concepts, and there are many areas where Constitutional concepts intermingle, and this is one of them.

There is no question that prison officials are allowed to use force which meets the particular circumstance. The essence of this case is that they exceeded that ceiling, and by —

THE COURT: Let me ask you — that is the area I would like to hear you concentrate on a little bit — is the question of whether they exceeded the reasonable amount of force necessary. Is that question in all cases a question for a jury?

MR. MECHANIC: I believe that there may be situations where a plaintiff is not presented a

[594]

prima facie case of establishing that the force that was used was in fact beyond the call of the situation, resulting in a particular injury to the plaintiff here involved.

As far as our readings are concerned, we haven't seen situations of cases — I don't know whether — haven't seen any from Mr. McAlister where there has been some type of an appeal from that type of decision. The cases, from looking at them, are being decided, and that by way of just example may

establish the burden anyway that needs to be applied in order not to present the case to a jury.

THE COURT: I assume you have seen the *Johnson vs. Glick* case which Judge Friendly wrote?

MR. MECHANIC: Yes, I have.

THE COURT: And probably have studied carefully. I note in that opinion that Judge Friendly, who is a very outstanding judge, on page 1033 said, in determining whether the Constitutional line has been crossed, "The court must look to such factors as the need for application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the

[595]

very purpose of causing harm."

Now, in that statement which he makes, which is obviously a very thoughful [*sic*] statement, he sets up two standards for determining whether there has been a Constitutional right involved, and they are — in the conjunctive, the first one is reasonable need for the force applied, basically, and he uses several examples to get to that point, but that is the first one.

And then he says, "and a good faith —" Now, I don't think there is any evidence in this case to indicate anything other than good faith. I think that there may have been hindsight. You can always find some other things that might have been done.

But are you saying in this case, in the context of a prison riot, that mere negligence or the failure to use reasonable care by itself is enough to submit this case to the jury?

MR. MECHANIC: Well —

THE COURT: On the Constitutional question. I'm not talking about the —

MR. MECHANIC: Right. If I could try to address that by maybe raising a couple considerations.

THE COURT: All right.

MR. MECHANIC: Judge Friendly is outlining some considerations, and I believe that is the context he

[596]

puts them in. And he is not saying in order to find a civil rights violation you must meet A, B, C, and D. And if you look at each of those considerations, I think they fall very well into a decision that needs to be made by the factfinder.

THE COURT: When you go to a jury, then, how do you instruct with respect to those considerations?

MR. MECHANIC: Well, the considerations — we submitted the same instruction on those considerations except for the last one, and we didn't do that without some thought; not just trying to hope that someone would neglect to see the fourth consideration. And we mentioned that fourth consideration in our supplemental brief.

But I think there has been adequate testimony concerning whether or not there was the need for the application of this particular force, even by defendant's own experts. There have

been questions raised that if in fact the jury determined that certain factual circumstances exist, they can even rely on defendant's own experts. As far as the need —

THE COURT: Let me ask you this in that regard — and this is present in the case. We have two experts on each side here, each of whom propounded other things that might have been done. What do you think should

[597]

have been done in this case that wasn't done? Why don't you just tell me what you think, now that the evidence is in, that it shows should have been done in the case?

MR. MECHANIC: Well, I guess we are almost getting to the summary argument.

THE COURT: That's what I want to hear. I want to hear what evidence do you think takes this case to a jury, and what the defendants did wrong. And I don't want detailed statements. I want you just to itemize them; tick them off for me.

Do you think they should have used tear gas?

MR. MECHANIC: I believe that tear gas would have taken care of that situation.

THE COURT: Well, my quetsion [*sic*] is, do you think they were — didn't use reasonable force in not using tear gas?

MR. ROTHSCHILD: [*sic*] Yes. I think that their own actions indicated that, because the main reason they say themselves that they didn't use tear gas — and there was a lot of confusion among the various defendants as to what was going on inside — even though Mr. Whitley had full opportunity to see what was going on inside. But we are dealing

with this barricade, and yet there was once again — and obviously we tried

[598]

to bring this out — no relationship between the shooting and the particular effort made by Mr. Whitley in going up to cell 201.

THE COURT: Wasn't there? Wasn't there? What if somebody had attacked Mr. Whitley from behind going up the stairs?

MR. MECHANIC: Mr. Whitley said that he had passed inmates on the way, and no one attempted to obstruct him, including Mr. Albers, and there to shoot at those inmates — and we had testimony to be believed or not believed by the jury as far as our experts and also common sense — that a well-trained — and we're not questioning that we're dealing with a well-trained force. And Mr. Kennicott [*sic*] said he just stepped right over that barricade and shot while he was going over it. Could have run from that barricade to those stairs in a matter of a few feet, and at least syphoned off that area pretty quickly. Maybe some inmates would have gotten through.

THE COURT: So you are saying — what you are arguing, if I can try to isolate the point you are arguing, that they should have used tear gas; second, they should not have shot those men that were running up the stairs behind Mr. Whitley.

MR. MECHANIC: Well, they should not have shot

[599]

them, number one, because no one ever indicated they presented a danger, and Mr. Whitley's own testimony —

THE COURT: I'm not asking for argument. I'm trying to get specifically to the point.

MR. MECHANIC: Yes, okay.

THE COURT: You are saying they should have used tear gas?

MR. MECHANIC: Yes.

THE COURT: They should not have shot those men that were running up the stairs?

MR. MECHANIC: And as a sub-part of that, they should not have shot those men without some type of warning, and that was not done after that warning shot, based on the defendant's own testimony, that from the point of view in the least that they might have gone up those stairs to other people who said that is what they expected.

So I think that is a very serious violation which goes way beyond the realm of negligence, goes way beyond the realm of, in my mind, deliberate indifference or certainly reaches that standard. They didn't care about those inmates. They cared about Officer Fitts and they had an absolute right to care about Officer Fitts, but they should have been more concerned about those people who are in their custody, and they didn't

[600]

do that. And that is tied into — I'm getting into argument, I know that.

THE COURT: You don't think this could become a question of judgment, for example, as to whether it's better to injure those inmates and not risk losing Sgt Fitts? That is not a judgment question as far as you are concerned?

MR. MECHANIC: It's a judgment question if the circumstances were different than we presented. Where Mr. Fitts is in a cell and the indication is that — and it turned out that inmates helped out, and that no one else ever made any threats to Officer Fitts, and no one else ever indicated that they wanted to harm Officer Fitts, that Officer Fitts is known to be hiding by inmates, and that Mr. Whitley and the other corrections officers involved did really make an attempt, simply should have been done, at least, if they believe our experts.

And I don't think their experts even stressed that an attempt should not be done to really find out who's who in that kind of situation, and if you look at the facts here, that opportunity was there, and I think that amounts to the breaking of a duty that exceeds negligence significantly, although I stressed my negligence argument.

[601]

There are other factors, and Mr. Cupp thinks that they ordered cell-ins throughout the evening. Mr. Whitley says he never did that. That's not just a matter of judgment; that is a matter of common sense, and if you break that, I do believe that it should be considered by the jury as to whether or not those circumstances warrant it.

Mr. Crist, his factual example of what he did with that hostage in his situation raised some very interesting questions

for the jury to consider, given the circumstances that we have presented here as well.

THE COURT: All right, anything else?

Do you want to say anything more?

MR. MCALISTER: Well, just briefly, because it came up first with respect to the argument about public bodies. If the Court will look at ORS 30.265, Section 3 — I will read it if I find it — it says — and this is incidentally under the Oregon Tort Claim [*sic*] Act, as I'm sure the Court is already aware — "Every public body acting within the scope of their employment or duties are immune from liability."

That's the way counsel wants you to read that section. It doesn't say that; it says, "Every public body and its officers and agents and employees [*sic*] acting within the scop [*sic*] of their employment or duties are

[602]

immune from liability."

Section E: "Any claim arising out of riot, civil commotion or mob action, or out of any act or omission in connection with the prevention of any of the foregoing —" That would seem on its face to cover this very circumstance, and I haven't heard counsel argue, and I don't think he could, that this was not something that fell within ORS 30.265, § 36-D [*sic*].

He simply says it only applies to the state, and I don't know how you can read that plain language and reach that conclusion. Now, as the Court knows, in interpreting statutes the only time you look to legislative history, if it has any value at all, is when the statute itself is unclear. This is a clear statute.

In addition, in order to reach the reading that counsel suggests, you would have to not only go to the legislative history, but you would have to ignore what was actually written and passed. I suggest you simply can't do that.

THE COURT: All right, do you want to respond to that, Mr. Mechanic?

MR. MECHANIC: Yes, Your Honor. I don't believe that language is clear because of the manner in which it falls within the Tort Claims Act. I'm again going to sound for a moment like Mr. McAlister talking about

[603]

1983, but the Tort Claims Act was designed to provide liability on the part of the state, not to restrict in any way that common law liability of public employees.

Before the Tort Claims Act was passed, you could always sue a public official, public employee. And the legislature decided that the state should also be liable in certain situations, and passed the Tort Claims Act.

THE COURT: Are you saying they couldn't at the same time they did that, though, grant immunity to the agents? That language is pretty —

MR. MECHANIC: Well, we believe that that language, if it's interpreted along with the legislative history, indicates that that is all that it was designed to do. I think in our brief we somewhat addressed those issues, although we felt that the language on what the intent was was so strong that we didn't consider them very much.

But in our brief, on pages 8 and 9, we did address the fact that the Tort Claims Act itself was clearly intended to remove the bar against holding the state liable for its torts and those of its officer, employees and agents which had existed under common law doctrine of sovereign immunity.

The Tort Claims Act, quote, "does nothing to

[604]

change the exposure of tort liability of public employees, [*sic*] for claims arising out of their employment."

Sovereign immunity is different than employee immunity, and the Tort Claims Act, we believe, deals with sovereign immunity, not employee immunity. If the Tort Claims Act tried to restrict common law liability, Constitutional questions are raised under due process, and there are cases that have dealt with that.

There is an Oregon case dealing with the automobile guest statute restricting liability in that situation. And the Oregon Supreme Court said while the legislature may change the remedy or the form of exposure, attached conditions precedent to its excess [*sic*] and perhaps abolish old and substitute new remedies, it can't deny a remedy entirely that was granted under common law, and if we are — we must look behind that language, because if we don't, we are going to get into a direct conflict with, I think, the due process which we had with the guest statute.

THE COURT: All right —

MR. MECHANIC: It's a complex issue. It's unfortunate we have to deal with so many complex issues in this one case,

but that's where we are.

[605]

THE COURT: All right. Mr. McAlister?

MR. MCALISTER: I think we have passed on from that one now, and I would like to discuss the position with respect to the options available to the institution. And we now slide once again dangerously close to confusing the argument with respect to whether or not a Constitutional violation occurred and the defendants' availability of a good faith or qualified immunity defense.

We are initially arguing there has been no Constitutional violation which is reviewable in a 1983 action. And to that end, I would particularly direct the Court's attention to two Ninth Circuit decisions. We have cited them, and I don't mean by citing these two again that we don't also rely just as heavily on the other cases we have cited, but the Ninth Circuit cases, particularly in *Meredith vs. State of Arizona* and *Spain vs. Procunier* requires actions intentional, unjustified, brutal and offensive to human dignity, intent to punish may be an element in deciding Eighth Amendment violations. Necessity is a major cruelty [*sic*].

And we would suggest for the Court as far as the Eighth Amendment violation is concerned, there is an intent requirement, and I don't know; I think these cases both in the Ninth Circuit and the Supreme

[606]

Court in *Gamble vs. Estelle* clearly set that out.

Now, I think we are going to have to talk about a recent case called *Bell vs. Wolfish*. And *Bell vs. Wolfish* is the case which says that prison administrators should be accorded wide deference in how they run their institution.

Now, counsel suggests other, what he states are reasonable alternatives. We would submit to the Court that that is not the test, even for a Constitutional violation. The test is not whether other reasonable alternatives existed, but whether or not the alternatives selected and used violated the Constitutional rights of the inmates.

Now, clearly — and I don't dispute Mr. Mechanic's statement — the officers could have taken a chance with Officer Fitts' life. They certainly could have attempted to use gas. They could have attempted to continue to talk. We could probably in hindsight talk could haves for the rest of the week. But this isn't a could have case. The case is, was the action taken reasonable under the circumstances?

Now, I agree in a sense that four expert witnesses were called, and one of them I would agree still is an expert witness who ought to be considered, the expert witness who suggested as an alternative that you

[607]

simply shoot down the tier past 54 people and pick off anybody going to cell 201. I think those kinds of suggestions ought to be discounted out of hand. But the point is not so much were other alternatives available, but was the one selected reasonable under the circumstances, and you have to strike a balance. You have to look at what you are

trying to save; what the risks are. And in that circumstance we have to look at Superintendent Cupp, who evaluated the circumstances as they were relayed to him, said, "We are going to have to use shotguns; the situation is serious, but let's not kill anybody. Shoot low."

Then we have to look at the weapons selected. The shot was not a "00" buck, although you would find — well, I won't mention it because it's not in the testimony, but it was not "00" buck. They didn't go head hunting. They simply went in, applied force, saved the hostage, and that was it.

Mr. Albers had already been shot at that point. Now, a substantial amount of testimony came in over our objection about what happened to Mr. Albers afterwards, and subsequently, apparently, by way of concession, Mr. Mechanic admits it has nothing to do with the case because there are four named defendants, and there is not one particle of evidence pointing to any

[608]

of those defendants as to how Mr. Albers was handled afterwords. [*sic*]

That issue, I would submit to the Court, is not an issue in this case. There is no claim that the defendants didn't act reasonably in arranging for medical treatment. There is no claim they had direct supervisory responsibility. In fact, the only evidence in the record is even before they went in with weapons they had ambulances waiting at the institution to take care of the injured. They had technicians included in the group that was going in to assist the wounded inmates.

Medical treatment is there almost as fast as the hostage is rescued. And so while there may be a complaint — Mr. Albers testified that some officer drug him down the steps — he didn't say it was any of these four people. And there is a claim that he lay out there too long. But he doesn't claim any of these four people left him.

And so we simply have to look at what decision is actually being challenged, and the challenged decision is, one, Mr. Cupp authorized the use of force within the institution — shotguns. How did he authorize it? Shoot low. What kind of force did he authorize? Non-deadly load, at least when shot in the

[609]

right area. Two, Mr. Keeney; what was his involvement? He ordered — all he did was basically he was the relay man. He relayed the authority to shoot low. He participated in the evaluation and agreed with the decision. I don't think any liability can be premised upon an agreement with a decision. What's Mr. Whitley's role? Mr. Whitley gave the order, "Shoot anyone heading toward cell 201, and shoot low," and the question is whether or not there is any evidence that can go to the jury that those instructions were unreasonable to the extent they violated Constitutional rights, and we would submit that they aren't.

[610]

THE COURT: All right. I'm prepared to make a decision in this case at this time.

In this very tragic case a man was shot through the leg, a very serious injury. I'm not permitted to evaluate this case in the light of sympathy to the defendant or, really, the conduct that the defendant himself or the plaintiff himself engaged in. I have to evaluate this case in the light of the conduct of the defendants under the circumstances at the time and not in hindsight in determining whether or not there is any substantial evidence from which a jury could conclude that there was a cause of action or violation of constitutional rights.

In that regard it's an extremely complex case. Not one single case has been cited to the Court involving a charge of violation of constitutional rights during the actual progress of a riot. Some cases have been cited where constitutional violations occurred after a riot was over, the Attica case and other cases.

We are involved here with a situation in which the uncontradicted facts are that the prison authorities had in their belief — and appropriately, in my judgment, no question about it — a very major problem. There were 200 inmates in Cell Block A; Fitts was a hostage. The leader, or apparent leader, of the riot, was armed with a knife; was threatening to kill Fitts if any attempt was

[611]

made to assault the position.

A barricade was thrown up, and an uncertain number of men, a minimum of six men or more armed with other clubs and weapons. Inmates fighting, one inmate injured. The

uncontradicted facts are that Mr. Klenk had told Mr. Whitley that the inmates had killed one man, that they were going to kill the rapos and other classifications of inmates.

It's easy to argue in hindsight in light of the way that this insurrection was put down, that this force wasn't necessary, but prison authorities are schooled in this manner. They have to be given some leeway, as the Wolfish case indicates. Prison authorities must be given reasonable latitude in supressing [*sic*] matters of this sort. If it were left to the courts, the lawyers, to supress [*sic*] these types of riots I'm not sure that we would ever get it done the way we move in our speed. The prison authorities — these men, the uncontradicted record is in this case that these men included men who had been convicted of murder, armed robbery, rape, assault with dangerous weapons.

While it was an onerous situation, I'm impressed — and I don't think there can be any second guessing the testimony of the plaintiff's expert or defendant's [*sic*] expert witness — that these men, under given circumstances, are

[612]

capable of doing anything. We already have evidence uncontradicted in this case that two inmates had joined to beat one inmate. We have uncontradicted evidence that other inmates were asking for assistance. We have a recognition that this type of explosive situation can change and degenerate rapidly.

Under these circumstances I'm asked to submit this case to a jury to determine in spite of everything we tried to do in

hindsight, have this jury determine whether there were other options or whether this conduct was reasonable.

I want to analyze that just a little bit and give my reasons for granting the motions for directed verdict on behalf of all the defendants.

It appears to me that the uncontradicted evidence is that Captain Whitley had a very good knowledge of what was going on, at least with Mr. Klenk in that area. There is simply no evidence of retaliation. The whole evidence in this case in that the effort was to obtain the release of Mr. Fitts. Mr. Fitts was located in a tier upstairs in 201. The orders that Captain Whitley gave to shoot any man who started up the stairs toward Room 201, in my determination, simply cannot be second guessed by a jury under the circumstances as we sit here in this courtroom.

He went in there unarmed to attempt to subdue

[613]

Mr. Klenk, who had a knife. It's uncontradicted that Mr. Klenk carried that knife right to Room 201 of the floor before he was subdued by Captain Whitley. The knife was found on the floor. The evidence is clear that certainly Fitts's [*sic*] life was in danger if Captain Whitley had been stopped, and hindsight and the fact that he was not stopped doesn't affect the order he gave earlier to shoot anybody who started up those stairs towards Room 201.

I am sympathetic to the plaintiff in this case. I'm not judging his conduct, even though it's clear from the uncontradicted evidence that he knew where he should have

been. He may very well have had some reasons to try to help out in connection with this matter. But the fact is, there had been a warning given. The Court can take judicial notice of the fact that when a riot such as this is going on, every prisoner knows that he should be in his cell and not out contributing or adding to the riot.

Captain Whitley was faced with a number of men disarming Klenk, and there is no way for him to know under what circumstances that some other inmate was going to become brutal, assaultive under those circumstances. Many men had engaged in the destruction of property. Many men were worked up. While there is evidence that the demonstration was quieting down, the simple fact is that the fact it was quieting down doesn't necessarily mean that

[614]

it's over, given an incident can occur, and here is a man with a knife who says he will kill or cut the throat of the hostage if any effort is made. The longer it goes on the more clearly dangerous it is.

Under the circumstances, I do not believe there is any evidence from which this jury could conclude under the facts of this case that there is any constitutional violation.

I'm impressed with the language of Judge Friendly in *Johnson against Glick* in this case that in determining whether the constitutional line has been crossed a court must look to such factors as the need for application of force, the relationship between the need and the amount of force that was used, the extent of injury if inflicted, and whether the force

was applied in good faith effort to maintain or restore discipline or, on the other hand, maliciously and sadistically for the very purpose of causing harm.

I find no substantial evidence from which the jury could conclude that under analyzing all of those factors this case should be decided on behalf of the plaintiff.

With respect to the pendent claims, it's also my determination, even on a negligence basis, that the same considerations apply. Negligence has to be evaluated in the light of the particular circumstances at the particular

[615]

time, and not in hindsight. That is true in Oregon, and under the circumstances, applying the analysis that I have made to the evidence that's been introduced in this case, I find no basis for submitting the matter on a negligence theory.

Irrespective of that, I'm satisfied that the Oregon Legislature did have the authority and did grant the immunity to the agents of the State of Oregon in this riotous situation under the Oregon statute. If the constitutionality of that statute is under attack, notice is required to be given and that matter has to be submitted. I'm not satisfied it is unconstitutional, and I'm satisfied that under that statute there is immunity with respect to the pendent claims.

I want to say very briefly that analysis of the expert's [*sic*] testimony on behalf of the plaintiff not only persuaded me that there is no substantial evidence from which the jury could conclude that this conduct was appropriate, but that there

were no reasonable alternatives. The suggestion certain formations should have been used and certain command decisions should have been made fall completely flat as I evaluate this. The time was an element. The superintendant [*sic*] was consulted, kept in part and — I withdraw that.

Captain Whitley consulted with a number of people,

[616]

was in and out of that cell, gave orders that I don't believe the jury could conclude were inappropriate under the circumstances.

I think we also have to take judicial notice of the fact that when you have a riot going on at a prison with a start such as this, the extent to which it can move very rapidly, is something that we here in this courtroom simply cannot conceive of. We don't know what was going on, and neither do the prisoners know what was going on in Cell Block C, where the uncontradicted testimony is that there was more trouble starting, so I think it's necessary for the prison authorities to supress [*sic*] it promptly.

The fact that the plaintiff was involved is unfortunate. If his motives were good in coming down there, it's an unfortunate circumstance, but I do not believe it changes the fact that there is simply no evidence from which this jury could conclude that the conduct of the defendants was inappropriate under the circumstances.

Because of the nature of this case and because I am deciding it from the pressure of other matters at this time without even a half a day's deliberation, without any tran-

script of the record, in an effort to expedite this matter towards appeal, if appeal is appropriate, I'm going to reserve the right to issue a written opinion in more detail.

[617]

The comments I have made are to avoid having lawyers prepare oral arguments tomorrow when the motion is going to be granted. I gave some thought to deferring and studying the matter overnight, but this would have meant unnecessary preparation by the lawyers. So that's my decition. [*sic*] The motions for directed verdict are granted. The jury will be advised tomorrow morning at 10:00, and I will not enter a judgment until I have issued a more formal decision.

Is there anything further at this time?

MR. MCALISTER: No (indicating)

THE COURT: If not, we are in recess.

OPINION OF NINTH CIRCUIT COURT OF APPEALS

[Opinion set forth in full as Appendix A, pages App-1 to App-14 of the printed petition for certiorari]

OPINION OF DISTRICT COURT FOR THE DISTRICT OF OREGON

[Opinion set forth in full as Appendix B, pages App-15 to App-40 of the printed petition for certiorari]